A

Mulia bt Ab Samat v Hussien bin Abd Shukor & Ors

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-639–12 OF 2018
CHOO KAH SING J
30 MARCH 2021

C *Land Law — Power of Attorney — Validity — Whether power of attorney was valid upon the demise of donor — Whether the power of attorney was irrevocable — Whether there was valid consideration for the power of attorney — Whether plaintiff's oral evidence to prove contents of the power of attorney was admissible — Whether the distribution order could defeat the power of attorney — Whether* D *distribution order ought to be set aside — Power of Attorney Act 1949 ss 5, 6 & 7*

Contract Law — Consideration — Natural love and affection — Whether s 26 of the Contracts Act 1950 was applicable to a power of attorney

E

This case concerned a dispute over the rightful ownership of two pieces of agriculture land which once belonged to Ab Samat bin Shukor ('the deceased'). The dispute was between the adopted daughter of the deceased ('the plaintiff') and the siblings of the deceased ('the defendants'). On 22 June 1994, the F deceased executed a power of attorney ('the impugned PA'). The deceased nominated and appointed the plaintiff as his attorney to do all or any of the things as expressly stated in the impugned PA. The impugned PA was filed and registered at the High Court of Shah Alam, Selangor with Registration No 2050/95 on 29 May 1995. The impugned PA was also registered at the G Pejabat Tanah dan Daerah Kuala Selangor on 21 June 1995. The two pieces of land mentioned in the impugned PA were known as GM 5134 Lot 27064 and GM 1584 Lot 18924, Mukim Tanjung Karang, Sungai Burong Blok 'Z', Daerah Kuala Selangor ('the said lands'). The deceased previously owned 446/576 (or 223/288) of undivided shares in both the said lands ('the H deceased's undivided shares'). The deceased passed away on 24 January 1998. According to the plaintiff's testimony, before the deceased passed away, after the execution of the impugned PA, the deceased had instructed the plaintiff to enter into the said lands and to work on the said lands. At the end of 2016 or early 2017, the plaintiff was driven out from the said lands by the first I defendant who claimed he and the other defendants were the beneficiaries of the deceased's undivided shares, and that they were entitled to take possession of the said lands. The defendants' claim was premised on a distribution order dated 12 October 2016 ('the distribution order') pursuant to s 13 of the Small Estates (Distribution) Act 1955 issued by the land administrator. The

distribution order was taken out by the first defendant in relation to the said lands without the knowledge of the plaintiff. Schedule 1 of the distribution order named the defendants as the beneficiaries of the said lands and each of the defendants was entitled to 223/2592 undivided shares in the said lands. On 8 March 2017, the plaintiff exercised her power granted by the impugned PA and executed a transfer form ('Form 14A') to transfer the deceased's undivided shares of the said lands to herself. The plaintiff filed a claim and sought, inter alia, to recover possession of the said lands and a declaration that the plaintiff was the rightful owner of the said lands and that the impugned PA which she relied on to transfer the ownership of the said lands to herself was valid. The defendants filed a counterclaim against the plaintiff premised on the distribution order. In gist, the defendants sought for a declaration that the transfer of ownership of the deceased's undivided shares in the said lands to the plaintiff using the impugned PA was ineffective and void in law. The main contention of the defendants was that there was no valid consideration for the impugned PA. The defendants also prayed for a declaration that the transfer of ownership of the deceased's undivided shares to the plaintiff was invalid and ultra vires as the transfer was contrary to the distribution order. The plaintiff's contention against the counterclaim was that the defendants' distribution order was illegitimately obtained because the defendants did not disclose all material facts to the land administrator during the enquiry hearing. The defendants failed to disclose that the deceased had executed the impugned PA which stated that the said lands were to be given to the plaintiff as a gift which the defendants were fully aware. The defendants also failed to disclose the fact that the deceased's lawful wife, Mariam bt Gusti Abu, was still alive on 12 October 2016 when the distribution order was obtained, and that she was entitled to be named as one of the beneficiaries together with the defendants at that material time. The main issue was whether the impugned PA was a valid instrument when the plaintiff decided to transfer the said lands to herself after the demise of the donor using and relying on the impugned PA as the transferor.

Held, allowing the plaintiff's claim and dismissing defendants' counterclaim:

(1) Based on the evidence of the plaintiff's relationship with the deceased, the court had no hesitation to find that the standing of the plaintiff and the deceased donor were in near relation to each other, despite the fact that the plaintiff had no blood relation with the deceased. The court was of the considered view that there were sufficient normal emotional feelings of human beings in the circumstances of the case to establish that the impugned PA was made on account of natural love and affection between the plaintiff and deceased standing in a near relation to each other despite the absence of blood relation. There were no express words referring to the passing of any consideration between the donee and the donor in the impugned PA, the natural love and affection of the donor

and the donee standing in near relationship would mean that the impugned PA was made in compliance with s 26(a) of the Contracts Act 1950 ('the CA') (see paras 20–21).

(2) It was noted that the impugned PA was also a deed of gift in that the said lands were a gift to the plaintiff. The impugned PA had not only vested the plaintiff with powers to effect a transfer of the said lands, it had also stated in writing that the said lands were a gift to the plaintiff by the deceased donor on 22 June 1994. The court had to give effect to the deed of gift other than recognising that there was a valid power of attorney (see para 22).

(3) The court was of the considered view that s 5 of the Power of Attorney Act 1949 ('the Act') was not applicable and the applicable section of the Act in the present facts would be s 6 of the Act, the provision governing an irrevocable power of attorney. In para 24 of the impugned PA, the donor had clearly expressed his intention that the impugned PA was meant to be irrevocable. As such, s 340(2) of the National Land Code was of no avail to the defendants (see paras 23–24).

(4) The court could not agree with the defendants' counsel's submission that ss 91–92 of the Evidence Act 1950 precluded admission of oral evidence other than those evidence that had been reduced in writing because the plaintiff was merely trying to prove the existence of a relationship between the donor and donee to justify that the instrument was made on account of love and affection. The plaintiff's evidence did not contradict, vary, add or subtract the terms in the instrument. The defendants' counsel's reliance on the said provisions of the Evidence Act was misconceived (see paras 25–26).

(5) With regard to the issue that the plaintiff executed the power in the impugned PA on 8 March 2017 after the distribution order was issued on 12 October 2016, the court was of the view that s 7 of the Act was applicable. The plaintiff did not run out of time to exercise the power in the impugned PA until the date of the said lands were transferred. The 'fixed time' in s 7 of the Act meant that the impugned PA remained subsisting until the power of attorney was exercised by the donee. The granting of the distribution order could not defeat the impugned PA or render the powers vested in the plaintiff pursuant to the impugned PA ineffective (see para 27).

(6) With regard to the validity of the distribution order, the land administrator who issued the distribution order testified that he was not informed of the existence of the impugned PA as well as the fact that Mariam bt Gusti Abu was still alive at that material time. If he knew, he would not have issued the distribution order without including Mariam bt Gusti Abu as one of the beneficiaries. Although the defendants were

not aware of the whereabouts of Mariam bt Gusti Abu or whether she was alive or otherwise at that material time, the defendants informed the land administrator that she was deceased, which information was clearly wrong and it was a false information. For that reason, the distribution order ought to be set aside as it was null and void and not enforceable (see paras 28–29).

[Bahasa Malaysia summary

Kes ini berkaitan dengan pertikaian berkaitan dengan hak milik dua bidang tanah pertanian yang pernah dimiliki oleh Ab Samat bin Shukor ('si mati'). Pertikaian adalah antara anak angkat si mati ('plaintif') dan adik-beradik si mati ('defendan'). Pada 23 Jun 1994, si mati telah menandatangani surat kuasa wakil ('PA yang dicabar'). Si mati telah menamakan dan melantik plaintif sebagai wakilnya untuk melaksanakan semua atau mana-mana perkara yang dinyatakan dalam PA yang dicabar tersebut. PA yang dicabar tersebut telah difailkan dan didaftarkan di Mahkamah Tinggi Shah Alam, Selangor, dengan No Pendaftaran 2050/95 pada 29 Mei 1995. PA yang dicabar turut didaftarkan di Pejabat Tanah dan Daerah Kuala Selangor pada 21 Jun 1995. Dua bidang tanah yang dinyatakan dalam PA yang dicabar dikenali sebagai GM 5134 Lot 27064 dan GM 1584 Lot 18924, Mukim Tanjung Karang, Sungai Burong Blok 'Z', Daerah Kuala Selangor ('tanah tersebut'). Si mati sebelum ini memiliki 446/576 (or 223/288) bahagian tidak berbahagi kedua-dua tanah tersebut ('bahagian tidak berbahagi si mati'). Si mati telah meninggal dunia pada 24 Januari 1998. Menurut keterangan plaintif, sebelum si mati meninggal dunia, selepas perlaksanaan PA yang dicabar, si mati telah mengarahkan plaintif untuk masuk ke dalam tanah tersebut untuk bertanam di tanah tersebut. Pada akhir 2016 atau awal 2017, plaintif telah dihalau dari tanah tersebut oleh defendan pertama yang menuntut bahawa dia dan defendan yang lain merupakan benefisiari bahagian tidak berbahagi si mati, dan bahawa mereka berhak untuk mengambil milikan tanah tersebut. Tuntutan defendan berdasarkan perintah pembahagian bertarikh 12 Oktober 2016 ('perintah pembahagian tersebut') selaras dengan s 13 Akta Harta Pusaka Kecil (Pembahagian) 1955 yang dikeluarkan oleh pentadbir tanah. Perintah pembahagian telah diambil oleh defendan pertama berkaitan dengan tanah tersebut tanpa pengetahuan plaintif. Jadual 1 perintah pembahagian menamakan defendan sebagai benefisiari tanah tersebut dan setiap defendan berhak kepada 223/2592 hakmilik tidak berbahagi dalam tanah tersebut. Pada 8 Mac 2017, plaintif melaksanakan kuasanya yang diberikan oleh PA yang dicabar dan melaksanakan satu borang pindahmilik (Borang 14A) untuk memindahkan bahagian tidak berbahagi si mati terhadap tanah tersebut kepada dirinya sendiri. Plaintif memfailkan tuntutan untuk mendapatkan, antara yang lain, untuk mendapatkan semula milikan tanah tersebut dan satu perisytiharan bahawa plaintif merupakan pemilik sah tanah tersebut dan bahawa PA yang dicabar yang digantung kepada untuk memindahkan tanah tersebut kepada dirinya sendiri adalah sah. Defendan memfailkan tuntutan

balas terhadap plaintif berdasarkan perintah pembahagian tersebut. Secara ringkasnya, defendan memohon untuk satu perisytiharan bahawa pindahmilik bahagian tidak berbahagi si mati kepada plaintif menggunakan PA yang dicabar tersebut adalah tidak berkuat kuasa dan tidak sah di sisi undang-undang. Hujahan utama defendan adalah tiada balasan yang sah untuk PA yang dicabar. Defendan juga memohon untuk pengisytiharan bahawa pindahmilik bahagian tidak berbahagi si mati kepada plaintif adalah tidak sah dan ultra vires kerana pemindahan tersebut adalah bertentangan dengan perintah pembahagian. Hujahan plaintif terhadap tuntutan balas adalah perintah pembahagian defendan diperoleh secara tidak sah kerana defendan tidak mengemukakan semua fakta yang material kepada pentadbir tanah sewaktu pendengaran inkuiri. Defendan gagal untuk mengemukakan fakta bahawa si mati telah melaksanakan PA yang dicabar yang menyatakan tanah tersebut adalah untuk diberikan kepada plaintif sebagai hadiah yang merupakan dalam pengetahuan defendan. Defendan juga gagal untuk mengemukakan fakta bahawa isteri sah si mati, Mariam bt Gusti Abu, masih hidup pada 12 Oktober 2016 apabila perintah pembahagian tersebut diperoleh, dan dia berhak untuk dinamakan sebagai salah seorang benefisiari bersama dengan defendan lain pada masa material tersebut. Isu utama adalah sama ada PA yang dicabar merupakan satu instrumen yang sah apabila plaintif membuat keputusan untuk memindahkan tanah tersebut kepada dirinya sendiri selepas kematian si mati menggunakan dan bergantung kepada PA yang dicabar sebagai pemindahmilik.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Berdasarkan keterangan hubungan plaintif dengan si mati, mahkamah tidak teragak-agak untuk membuat dapatan bahawa dan si mati yang menderma mempunyai hubungan baik antara satu sama lain, meskipun mereka tiada pertalian darah. Mahkamah ini berpandangan bahawa wujud perasaan biasa manusia dalam keadaan kes untuk membuktikan bahawa PA yang dicabar dibuat atas sebab kasih sayang antara plaintif dan si mati berdasarkan hubungan rapat mereka walaupun ketiadaan pertalian darah. Tiada perkataan nyata yang merujuk kepada pemberian apa-apa balasan antara penderma dan penerima derma dalam PA yang dicabar, kasih sayang semulajadi antara penderma dan penerima derma yang berada dalam hubungan rapat bermaksud bahawa PA yang dicabar dibuat mematuhi s 29(a) Akta Kontrak 1950 ('AK') (lihat perenggan 20–21)

(2) Adalah diambil maklum bahawa PA yang dicabar juga merupakan satu surat ikatan hadiah yang mana tanah tersebut merupakan satu hadiah kepada plaintif. PA yang dicabar bukan sahaja memberi plaintif kuasa untuk menyebabkan pemindahan tanah tersebut, ianya juga menyatakan secara bertulis bahawa tanah tersebut merupakan satu hadiah kepada

plaintif daripada si mati pada 22 Jun 1994. Mahkamah hendaklah membenarkan surat ikatan tersebut selain daripada mengiktiraf bahawa ianya merupakan satu surat kuasa wakil yang sah (lihat perenggan 22). A

(3) Mahkamah berpandangan bahawa s 5 Akta Surat Kuasa Wakil 1949 ('Akta tersebut') tidak terpakai dan seksyen Akta tersebut yang terpakai berdasarkan fakta dalam kes ini adalah s 6 Akta tersebut, peruntukan yang mentadbir surat kuasa wakil yang tidak boleh dibatalkan. Dalam perenggan 24 PA yang dicabar, penderma dengan jelas menyatakan niatnya bahawa PA tersebut adalah berniat untuk tidak boleh dibatalkan. Oleh yang demikian, s 340(2) Kanun Tanah Negara tidak boleh digantung oleh defendan-defendan (lihat perenggan 23–24). B C

(4) Mahkamah tidak boleh bersetuju dengan hujahan peguam defendan bahawa ss 91–92 Akta Keterangan 1950 mengecualikan penerimaan keterangan lisan selain daripada keterangan yang telah diletakkan secara bertulis kerana plaintif hanya cuba untuk membuktikan kewujudan hubungan antara penderma dan penerima derma untuk memberi justifikasi bahawa instrumen tersebut dibuat atas dasar kasih sayang. Keterangan plaintif tidak bercanggah, mengubah atau mengurangkan terma dalam instrumen tersebut. Kebergantungan peguam terhadap peruntukan Akta Keterangan adalah salah (lihat perenggan 25–26). D E

(5) Berkaitan dengan isu bahawa plaintif telah melaksanakan kuasa dalam PA yang dicabar pada 8 Mac 2017 selepas perintah pembahagian telah dikeluarkan pada 12 Oktober 2016, mahkamah berpandangan bahawa s 7 Akta tersebut adalah terpakai. Plaintif tidak kehabisan masa untuk melaksanakan kuasa PA yang dicabar sehingga tarikh tanah tersebut dipindahkan. 'Masa yang ditetapkan' dalam s 7 Akta tersebut bermaksud bahawa PA yang dicabar kekal wujud sehingga pemberian kuasa wakil telah dilaksanakan oleh penerima derma. Pemberian perintah pembahagian tidak menewaskan PA yang dicabar atau menyebabkan kuasa yang diberikan kepada plaintif selaras dengan PA tersebut tidak berkesan (lihat perenggan 27). F G

(6) Berkaitan dengan kesahan perintah pembahagian, pentadbir tanah yang mengeluarkan perintah pembahagian memberikan keterangan bahawa dia tidak dimaklumkan mengenai kewujudan PA yang dicabar dan juga fakta bahawa Mariam bt Gusti Abu masih wujud pada waktu material tersebut. Sekira ianya diketahui oleh beliau, dia tidak akan mengeluarkan perintah pembahagian tersebut tanpa melibatkan Mariam bt Gusti Abu sebagai salah seorang benefisiari. Walapun defendan tidak mengetahui di mana Mariam bt Gusti Abu berada atau sama ada dia masih hidup atau sebaliknya pada masa yang material tersebut, defendan memaklumkan kepada pentadbir tanah bahawa dia telah meninggal dunia, maklumat tersebut adalah jelas salah dan ianya merupakan maklumat yang palsu. Atas sebab tersebut, perintah pembahagian perlu diketepikan kerana H I

ianya tidak sah dan tidak boleh dikuat kuasakan (lihat perenggan 28–29).]

Cases referred to

Chung Kow @ Chan Mah Sau v Chew Kon Yen [1994] MLJU 525, HC (refd)
Gan Seng Kee v Yap Yok Lan [2015] MLJU 885, HC (refd)
Kupusamy a/l Sidambaram (wakil harta pusaka Sathabaram a/l Veerappan, si mati) v Verapan a/l Sinathamby & Ors [2013] MLJU 236; [2013] 8 CLJ 842, HC (refd)
Tan Soh Sim, deceased, In re; Chan Lam Keong and 4 others v Tan Saw Keow and 3 others [1951] 1 MLJ 21, CA (refd)

Legislation referred to

Contracts Act 1950 s 26, 26(a)
Evidence Act 1950 ss 91, 92
National Land Code s 340(2), Form 14A
Powers of Attorney Act 1949 ss 3, 4, 5, 6, 7, 9, 10, 11
Small Estates (Distribution) Act 1955 s 13

Mohaji Selamat (Halijah with him) (Mohaji, Hazury & Ismail) for the plaintiff.
Samry Masri (Samry Masri & Assoc) for the defendants.

Choo Kah Sing J:

INTRODUCTION

[1] This case concerns a dispute over the rightful ownership of two pieces of agriculture land which once belonged to Ab Samat bin Shukor ('the deceased'). The dispute is between the adopted daughter (plaintiff) of the deceased and the siblings (defendants) of the deceased. The parties have gone through a full trial. On 22 January 2021, this court delivered its decision in favour of the plaintiff's claim and dismissed the defendants' counterclaim. The reasons for the decision are set out as below.

SALIENT BACKGROUND FACTS

[2] The plaintiff is the adopted child of the deceased. On 22 June 1994, the deceased executed a power of attorney ('the impugned PA'). The deceased nominated and appointed the plaintiff as his attorney to do all or any of the things as expressly stated in the impugned PA. The relevant paragraphs of the impugned PA are reproduced as below:

> 8. To manage and conduct my business in my land held under geran No GM 1584 & GM 1585 Lot 18924 (Kg) & 7752 (Bdg) – 446/576 share, Mukim Tanjong Karang, District of Kuala Selangor, and to do and perform all acts or things in the

execution of the said business as fully and completely as I might do were personally present.

9. To sell to any person the said land only, property whether now belonging to me or which shall hereinafter belong to me and for that purpose to sign and execute all transfers and other instruments necessary.

...

14. To enter into possession of the said land only property, to give notice to quite to increase the rents of my lands and houses; to take down rebuild, alter, improve or repair all or any of such houses or buildings as occasion may require and to do every act and thing for the improvement of the same.

...

24. Saya AB SAMAT BIN SHUKOR mengaku dengan sesunggohnya menyerahkan semua hak bahagian saya dalam tanah No GM 1584 & GM 1585 Lot 18924 (Kg) & 7752 (Bdg) – 446/576 bahagian kepada anak perempuan saya bernama MULIA BT AB SAMAT KP No A 0679928 biru bagi menguasai, memiliki, mempunyai tanah itu dengan sepenoh penohnya. Surat Kuasa Wakil Penoh yang saya berikan ini adalah membolehkan Penerima Surat Kuasa Wakil Penoh ini memindahkan hakmilik tanah ini kepada namanya dengan tanpa saya hadir dengan menanda tangani dalam borang2 permindahan hak milik tanah yang lain. Surat Kuasa Wakil Penoh ini tidak boleh sekali2 dibatalkan atau pun Tarik balik dengan apa cara jua pun dan tidak terikat dengan kematian saya atau pun kepapa'an saya hinggalah hak bahagian tanah ini telah di pindah milik kepada nama Penerima Surat Kuasa Wakil Penoh ini dengan tetap nya.

...

[3] The impugned PA was filed and registered at the High Court of Shah Alam, Selangor with Registration No 2050/95 on 29 May 1995. The impugned PA was also registered at the Pejabat Tanah dan Daerah Kuala Selangor with Registration No Jilid 36, Folio 79 on 21 June 1995.

[4] The two pieces of land mentioned in para 8 of the impugned PA are currently known as GM 5134 Lot 27064 and GM 1584 Lot 18924, Mukim Tanjung Karang, Sungai Burong Blok 'Z', Daerah Kuala Selangor ('the said lands'). The deceased previously owned 446/576 (or 223/288) of undivided shares in both the said lands ('the deceased's undivided shares').

[5] The deceased passed away on 24 January 1998. According to the plaintiff's testimony (PW5-WS1, see Q & A 21), before the deceased passed away, after the execution of the impugned PA on 22 June 1994, the deceased had instructed the plaintiff to enter into the said lands and to work on the said lands. At the end of 2016 or early 2017, the plaintiff was driven out from the said lands by the first defendant who claimed he and the other defendants were

A the beneficiaries of the deceased's undivided shares, and that they were entitled to take possession of the said lands.

[6] The defendants' claim is premised on a distribution order dated 12 October 2016 ('the distribution order') pursuant to s 13 of the Small Estates B (Distribution) Act 1955 issued by the land administrator of Kuala Selangor. The distribution order was taken out by the first defendant in relation to the said lands without the knowledge of the plaintiff. *Jadual* 1 of the distribution order has named the defendants as the beneficiaries of the said lands and each C of the defendants is entitled to 223/2592 undivided shares in the said lands. The defendants are the surviving step-siblings of the deceased having the same father, but different mothers.

[7] On 8 March 2017, the plaintiff exercised her power granted by the D impugned PA and executed a transfer form (Borang 14A) to transfer the deceased's undivided shares of the said lands to herself. She is still the registered proprietor of the said lands. The plaintiff filed this action seeking, inter alia, to recover possession of the said lands and a declaration that she is the rightful owner of the said lands and that the impugned PA which she relied on to E transfer the ownership of the said lands to herself is valid.

[8] The defendants filed a counterclaim against the plaintiff premised on the distribution order. In gist, the defendants sought for a declaration that the transfer of ownership of the deceased's undivided shares in the said lands to the F plaintiff using the impugned PA was ineffective and void in law. The main contention of the defendants is that there was no valid consideration for the impugned PA. The defendants also prayed for a declaration that the transfer of ownership of the deceased's undivided shares to the plaintiff is invalid and ultra vires as the transfer was contrary to the distribution order. G

[9] The plaintiff's contention against the counterclaim is that the defendants' distribution order was illegitimately obtained because the defendants did not disclose all material facts to the land administrator during H the enquiry hearing. The defendants failed to disclose that the deceased had executed the impugned PA which stated that the said lands were to be given to the plaintiff as a gift which the defendants were fully aware. The defendants also failed to disclose the fact that the deceased's lawful wife Mariam bt Gusti Abu was still alive on 12 October 2016 when the distribution order was I obtained, and that she was entitled to be named as one of the beneficiaries together with the defendants (in the event the distribution order was enforceable in law) at that material time. Mariam bt Gusti Abu has since passed away on 3 December 2018.

THE FINDINGS OF THIS COURT

[10] In essence, the main issue to be tried before this court is whether the impugned PA was a valid instrument when the plaintiff decided to transfer the said lands to herself after the demise of the donor using and relying on the impugned PA as the transferor.

[11] The defendants' counsel submitted that the impugned PA was no longer valid upon the demise of the donor on 24 January 1998. The plaintiff used the impugned PA to transfer the said lands to herself on 8 March 2017 which was way after the date of the death of the donor, therefore, the transfer of the said lands could not be valid. The defendants' counsel relied on s 5 of the Powers of Attorney Act 1949 (Revised 1990) ('the Act') which states:

> 5 Revocation
>
> Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the registrar or a senior assistant registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, *continue in force until* notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office which the office copy or true copy thereof has been so deposited, or *either the donor or the donee has died* or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy.

[12] The defendants' counsel also referred this court to s 6 of the Act which states as follows:

> 6 Powers of attorney given for valuable consideration
>
> (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
>
> (b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
>
> (c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of

A the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

B

[13] The defendants' counsel submitted that in order for a valid irrevocable power of attorney, valuable consideration must have been given under the instrument. The defendants' counsel submitted that there was no valuable C consideration given in the impugned PA between the donee and the donor. The defendants' counsel further submitted that therefore, the impugned PA would be governed by s 5 of the Act, ie no longer in force upon the death of the donor, and not s 6 of the Act.

D **[14]** The plaintiff's counsel submitted that there was valuable consideration given in the form of natural love and affection. The plaintiff's counsel relied on s 26 of the Contracts Act 1950 ('the CA 1950') which states as follows:

Agreement without consideration, void, unless —

E 26 An agreement made without consideration is void, unless

it is in writing and registered;

(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on F account of natural love and affection between parties standing in a near relation to each other.

[15] Generally speaking, a power of attorney by its ordinary nature is a form of agreement between two parties — a donor and a donee. The CA 1950 is the G general law that governs such an agreement. However, because of its specific nature involving the vesting of powers from one party to another party, the vesting of those powers is regulated by a specific law which is the Act. The CA 1950 remains germane to a power of attorney in so far as the general principles of contract law are concerned. Section 26 of the CA 1950 is one of those H general principles of contract law applicable to a power of attorney.

[16] A power of attorney has to be expressed in writing. By virtue of the requirements stated under ss 3, 4, 9, 10 and 11 of the Act, a power of attorney has to be in the form of a written instrument. Hence, s 26(a) of the CA 1950 I is clearly relevant to this type of written instrument, ie a power of attorney. Section 26(a) of the CA 1950 clearly provides that such written instrument, though made without consideration, could still be valid and enforceable if it is made 'on account of natural love and affection between parties standing in a near relation to each other'.

[17] In *In re Tan Soh Sim, deceased; Chan Lam Keong and 4 others v Tan Saw Keow and 3 others* [1951] 1 MLJ 21, a case cited by the plaintiff's counsel, the judgment of His Lordship Briggs J sheds some light to the meaning of the phrase 'natural love and affection between parties standing in a near relation to each other'. In delivering the judgment of the Court of Appeal, FM, His Lordship held as follows:

> The other requirement of s 26 is that the agreement should have been made 'on account of natural love and affection between parties standing in a near relation to each other.' In the phrase 'natural love and affection' I think full effect must be given to the word 'natural', and that it means not only 'reasonably to be expected', but 'reasonably to be expected, having regard to the normal emotional feelings of human beings.' This immediately establishes the connection of these words with the later phrase 'standing in a near relation.' That phrase indicates, in my opinion, that the 'emotional feelings' required are of a special type, that is to say, they are such feelings as may ordinarily be expected to spring from the fact of the 'near relation.' If either the feelings or the relation are lacking, the section does not apply.
>
> ... For example, if an orphan were brought up by comparatively remote relations, who were nevertheless his nearest, I think the court might hold them to be 'near' in the special circumstances, though ordinarily they would not be 'near' ...

[18] In the present facts, the plaintiff was the adopted daughter of the deceased. The plaintiff (PW5) testified that she was brought up by the deceased and her adopted mother Mariam bt Gusti Abu (also deceased) since she was very young until they both passed away. After her marriage and after giving birth to four children, she continued to stay with her adopted parents and took care of them until they passed away. The plaintiff stated in her witness statement (Q & A 7) as follows:

> Yang saya faham, berdasarkan pengalaman menjadi anak angkat yang dibesarkan semenjak kecil sehingga dewasa dan berkahwin, arwah bapa saya dan isteri beliau telah menggangap saya seperti anak beliau sendiri di mana beliau telah menjaga, memelihara dan membesarkan saya semenjak saya kecil dengan penuh kasih sayang. Saya juga atas perasaan kasih dan sayang kepada arwah bapa saya iaitu Ab Samat bin Shukor yang telah saya anggap seperti bapa kandung saya sendiri juga telah menjaga beliau setelah saya dewasa sehingga beliau meninggal dunia pada 24 Januari 1998 di mana saya telah dibesarkan, tinggal dan hidup bersama-sama arwah bapa saya selama 31 tahun. Malahan, nama saya juga telah dibintikan kepada nama arwah bapa saya iaitu Ab Samat bin Shukor. Saya juga sangat dimanjakan dan disayangi oleh arwah bapa saya iaitu Ab Samat bin Shukor dan isteri beliau iaitu Mariam bt Gusti Abu iaitu isteri beliau sepertimana sayangnya seorang bapa dan ibu terhadap anak mereka sendiri.
>
> Selepas saya berkahwin, atas permintaan bapa saya, kami telah tinggal bersama dengan ibu dan bapa saya iaitu Ab Samat bin Shukor dan Mariam bt Gusti Abu di Lorong 12, Ban 3, Parit 1, Sungai Sireh, 45500 Tanjong Karang, Selangor Darul Ehsan di mana saya dan suami saya telah membantu kehidupan seharian mereka dan menjaga mereka dengan penuh kasih sayang sebagai seorang anak. Saya telah

menjalankan tugas sebagai seorang anak dengan membantu arwah ibu bapa saya iaitu Ab Samat bin Shukor dan Mariam bt Gusti Abu menguruskan rumah termasuk dengan memasak, menguruskan maka pakai mereka, dan menjaga mereka serta kebajikan mereka.

[19] Her testimony was supported by Kaliwon @ Lewon bin Sipon (PW2), her neighbour, a subpoena witness, in that he has personal knowledge of the plaintiff's relationships with the deceased and the adopted mother. His oral testimony was not challenged.

[20] Based on the evidence of the plaintiff's relationship with the deceased, this court has no hesitation to find that the standing of the plaintiff and the deceased donor were in near relation to each other, despite the fact that the plaintiff has no blood relation with the deceased. In *Chung Kow @ Chan Mah Sau v Chew Kon Yen* [1994] MLJU 525, the High Court held it was sufficient to justify the parties were near relation to each other despite having no blood relation while applying the legal proposition in *Re Tan Soh Sim, deceased*. This court is of the considered view that there are sufficient normal emotional feelings of human beings in the circumstances of the case to establish that the impugned PA was made on account of natural love and affection between the plaintiff and deceased standing in a near relation to each other despite the absence of blood relation (see also *Gan Seng Kee v Yap Yok Lan* [2015] MLJU 885).

[21] Hence, there is no express words referring to the passing of any consideration between the donee and the donor in the impugned PA, the natural love and affection of the donor and the donee standing in near relationship would mean that the impugned PA was made in compliance with s 26(a) of the CA 1950.

[22] It is noted that the impugned PA, particularly para 24, is also a deed of gift in that the said lands were a gift to the plaintiff. In *Chung Kow @ Chan Mah Sau*, the High Court recognised that a deed of gift could be granted within a written power of attorney. The High Court stated that 'as a transfer of this land cannot be affected without the title deed being issued, this gift was effectively registered by means of this power of attorney.' Hence, in the present case, the impugned PA had not only vested the plaintiff with powers to effect a transfer of the said lands, it had also stated in writing that the said lands were a gift to the plaintiff by the deceased donor on 22 June 1994. This court has to give effect to the deed of gift other than recognising that there was a valid power of attorney.

[23] Based on the above analysis, this court is of the considered view that s 5 of the Act is not applicable in the given set of facts in this present case. The

applicable section of the Act in the present facts would be s 6 of the Act, ie the provision governing an irrevocable power of attorney. In para 24 of the impugned PA, the donor had clearly expressed his intention that the impugned PA was meant to be irrevocable.

[24] The defendants' counsel submitted that on the assumption s 5 of the Act applies, s 340(2) of the National Land Code should prevail, ie the registration was obtained by means of an insufficient or void instrument. This court's finding is that s 5 of the Act does not apply, as such, s 340(2) of the National Land Code is of no avail to the defendants.

[25] The defendants' counsel relied on ss 91 and 92 of the Evidence Act 1950 to exclude the plaintiff's oral evidence to prove the contents of the impugned PA was made on account of love and affection. The defendants' counsel urged this court to limit its examination within the four corners of the instruments and submitted that s 92 of the Evidence Act 1950 precluded admission of oral evidence other than those evidence that had been reduced in writing, ie the impugned PA.

[26] This court could not agree with the defendants' counsel's submission because the plaintiff was merely trying to prove the existence of a relationship between the donor and donee to justify the instrument was made on account of love and affection. The plaintiff's evidence did not contradict, vary, add or subtract the terms in the instrument. The defendants' counsel's reliance on the said provisions of the Evidence Act is misconceived.

[27] With regard to the issue that the plaintiff executed the power in the impugned PA on 8 March 2017 after the distribution order was issued on 12 October 2016, this court is of the view s 7 of the Act is applicable. The plaintiff did not run out of time to exercise the power in the impugned PA until the date of the said lands were transferred. The 'fixed time' in s 7 of the Act means the impugned PA remains subsisting until the power of attorney is exercised by the donee (see *Chung Kow @ Chan Mah Sau*). Hence, the granting of the distribution order on 12 October 2016 could not defeat the impugned PA or render the powers vested in the plaintiff pursuant to the impugned PA ineffective.

[28] With regard to the validity of the distribution order dated 12 October 2016, Nazli bin Zainal (PW1), the land administrator who issued the distribution order, testified that he was not informed of the existence of the impugned PA as well as the fact that Mariam bt Gusti Abu was still alive at that material time. If he knew, he would not have issued the distribution order without including Mariam bt Gusti Abu as one of the beneficiaries. Mariam bt Gusti Abu was entitled to the deceased's undivided shares together with other

beneficiaries, because she was the lawful wife and had survived the deceased and was alive at the material time the distribution order was granted.

[29] The defendants' evidence is that they were not aware that Mariam bt Gusti Abu was still alive at that material time because they had no contact with her for a long time. Although the defendants were not aware of the whereabouts of Mariam bt Gusti Abu or whether she was alive or otherwise at that material time, the defendants informed the land administrator that she was deceased, which information was clearly wrong, ie false information. For that reason, the distribution order ought to be set aside as it is null and void and not enforceable (see *Kupusamy a/l Sidambaram (wakil harta pusaka Sathabaram a/l Veerappan, si mati) v Verapan a/l Sinathamby & Ors* [2013] MLJU 236; [2013] 8 CLJ 842).

[30] This court has considered the evidence of PW3, Abd Basir bin Mohamed Amzah, and accepted his testimony as credible. His evidence goes to establish the damages suffered by the plaintiff after the plaintiff and her worker were chased out from the said lands by the first defendant for the period between 2017 and 2020. The plaintiff also gave evidence of the losses suffered by her because her worker was not allowed to cultivate the said lands since 2017. This court accepted the evidence of RM48,000 as the plaintiff's losses suffered from 2017 to 2020.

CONCLUSION

[31] For the reasons stated above, this court allowed the plaintiff's claim as per prayers 25(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (n) and (g), ie costs of RM30,000 (subject to allocator fees) to be paid by the defendants to the plaintiff. This court dismissed the defendants' counterclaim and ordered that the defendants to pay costs of RM10,000 (subject to allocator fees) to the plaintiff.

Plaintiff's claim allowed with costs of RM30,000; defendant's counterclaim dismissed with costs of RM10,000.

Reported by Mohd Kamarul Anwar